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**PP**

**v.**

**TAY JUI KWANG & ORS**

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HIGH COURT SABAH & SARAWAK, SRI AMAN
LAU BEE LAN J
[CRIMINAL REVISION NO: 43-02-2006-II (SG)]
16 OCTOBER 2006

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***CRIMINAL PROCEDURE:*** *Revision - Jurisdiction of court - Magistrate's court - Granting of Discharge Not Amounting To An Acquittal (DNAA) - Whether an order of DNAA is a procedural or a substantive order - Criminal Procedure Code, ss. 173(g), 254*

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***CRIMINAL PROCEDURE:*** *Judgment - Alteration to - Whether Subordinate Court may alter its judgment - Whether magistrate erred in setting aside his order of DNAA - Criminal Procedure Code, s. 278*

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The three cases herein were jointly tried before the learned magistrate. The trial was postponed no less than 15 times since the accused persons were first charged in court. The court then fixed the continuation of trial for final time on 11 - 14 July 2005. However, when the trial resumed, the prosecution made use of only two days and called only three witnesses. The prosecution's application for further adjournment was granted and the trial was then adjourned for a further final adjournment on 23 - 25 November 2005. On 23 November 2005, the prosecution applied for further adjournment which was rejected. Accordingly, the learned magistrate made an order for the accused persons to be discharged not amounting to acquittal. However, this order was set aside upon application by the defence counsels. The prosecution was then ordered to continue with the trial and thereafter to close its case. However, the learned prosecuting officer again sought an adjournment which was refused. The magistrate then ordered the parties to prepare and tender their written submissions at the end of the prosecution's case as no further evidence was made available by the prosecution. The defence counsels submitted their written submissions but the prosecuting officer refused to do so. The learned magistrate submitted this case for the court's consideration as to whether in the circumstances of the case, the prosecution's case has come to an end and thereafter whether he may proceed to deliver his ruling as to whether the prosecution has made out a *prima facie* case. The court also had to consider whether the learned magistrate had acted correctly in setting aside his order of DNAA after his pronouncement.

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**Held (setting aside the order of the learned magistrate and ordering that the hearing of the case be continued on by him):**

**(1)** An order of DNAA is not a procedural order but it is a substantive order made when the trial judge is of the view that the charge is groundless or where the court refuses to grant any further postponement of a trial or where the officer conducting the prosecution declines to prosecute further at any stage of any trial. Unlike the High Court, the Subordinate Court has no power to alter its judgment. Therefore, the learned magistrate erred in setting aside his order of DNAA. (paras 7, 8 & 9)

**(2)** What was lacking in this case was the cooperation and mutual respect between the Bench and the Prosecution which is required for the proper administration of justice. Unnecessary postponement in this case could have been curtailed if there had been greater cooperation and mutual respect between the Bench and the Prosecution. (para 12)

**Case(s) referred to:**
*Indran & Anor v. PP [1985] 1 LNS 52 HC* ***(refd)***
*Maleb Su v. PP & Another Case [1984] 1 CLJ 378; [1984] 2 CLJ (Rep) 232 HC* ***(refd)***
*PP v. Hoo Chang Chwen [1962] 1 LNS 123 HC* ***(refd)***
*PP v. Mohamed Said [1982] 1 LNS 115 HC* ***(refd)***
*PP v. RK Menon & Anor [1977] 1 LNS 101 HC* ***(refd)***
*PP v. Zainuddin Sulaiman & Ors [1986] 1 CLJ 468; [1986] CLJ (Rep) 232 SC* ***(refd)***
*Saad Abas & Anor v. PP [1998] 4 CLJ 575 CA* ***(refd)***

**Legislation referred to:**
Criminal Procedure Code, ss. 129(i)(b), 173(g), 254, 278, 307(1), (i)

*For the applicant - Siti Rafidah Zainuddin; DPP*
*For the 1st respondent - Voon Lee Shan; M/s Voon & Co Advocates*
*For the 2nd and 3rd respondents - John Shek; M/s John Shek, Sigar, Wei Yee & Co Advocates*

*Reported by Amutha Suppayah*

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## JUDGMENT

**Lau Bee Lan J:**

### Background

B **[1]** The learned magistrate *vide* a letter 18 April 2006 (encl. 1) has submitted this case for the court's consideration as to whether in the circumstances of the case and in view of the fact that he has refused to grant further adjournment of the trial, the prosecution's case has come to an end and thereafter whether he may proceed to deliver his ruling
C as to whether the prosecution has made out a *prima facie* case against the 1st, 2nd and 3rd accused. The background of this case which has led to this scenario has been summarised by the learned magistrate in encl. 1 which is reproduced hereafter for ease of understanding the issues to be determined as follows:

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> 2. On 24.11.2005, the Magistrate's Court at Betong had ordered parties to the above matter to prepare and tender their written submissions at the end of the prosecution's case as no further evidence forth coming or made available by the prosecution. The due date for parties to file in their written submissions was rescheduled to 10.4.2006 and written reply on 17.4.2006. Both
> E the learned defence counsels, Mr. Voon Lee Shan (counsel for the 1st accused) and Mr. John Shek (counsel for the 2nd and 3rd accused persons) had submitted their written submissions to the court.
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> 3. Despite the said order of the court for parties to prepare their
> F written submissions, the learned prosecuting officer refuses to prepare and submit his written submissions to the court. This refusal is expressed in a letter dated 9.1.2006 from the learned prosecuting officer and received by the court on 17.3.2006. The content of the letter is as follows:
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> > Untuk makluman pihak tuan saya selaku pegawai pendakwa mewakili pegawai pendakwaraya telah menerima arahan dari kamar Yang Arif Peguam Kanan Persekutuan, Sarawak agar tidak mengemukakan sebarang penghujahan memandangkan pihak pendakwa tidak menutup kes diperingkat pendakwaan bagi kes ini.
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> 4. Briefly, the background of the matter is as follows. Before the Magistrate's Court at Betong, the 3 cases above were allowed to be jointly tried. The prosecution commenced on 11.9.2001. There are 3 accused persons. In each of the 3 cases, the 1st
> I accused was charged with an offence of forgery for the purpose of cheating an offence punishable under section 468 of the Penal Code. The 2nd accused was charged with an offence of abetment, an offence punishable under section 109 of the Penal Code read together with section 468 of the same code in respect

of both cases BTG-83-02-2001 and BTG-83-03-2001. However, on 10.4.2002 the former presiding Magistrate discharged the 2nd accused under section 173(g) of the CPC. The 3rd accused was charged with an offence of abetment punishable under section 109 of the Penal Code read together with section 468 of the same code.

5. After several adjournments, the court by a Notice of Reschedule dated 28.2.2005 fixed the continuation of trial for final time on 11 - 14.7.2005 (4 days were set aside). In this connection, court records disclose that subpoenas had been issued on 1.7.2005 to 13 witnesses to attend court for the trial on the said dates 11 - 14.7.2005. However, when the trial resumed, the prosecution made use of only 2 days (11 - 12.7.2005) and called only 3 witnesses (PW9, PW10 and PW11). The learned prosecuting officer sought a further adjournment. The reason given was that the learned prosecuting officer wished to restudy the case and to call only the relevant witnesses (though almost 4 years has elapsed since the commencement of the prosecution). The prosecution's application for further adjournment was granted and the trial was then adjourned for a further final adjournment on 23 - 25.11.2005.

6. Court record shows that the prosecution did not apply for subpoenas to secure the attendance of its witnesses in court for the continuation of the trial on 23 - 25.11.2005. On 23.11.2005, the prosecution called only one witness - Chief Inspector Megat Ayob B. Megat Arifin (PW12), who at that material time attached to Ibupejabat Polis Daerah, Betong. PW12's office is just a stone throw from the Mahkamah Majistret, Betong. This may explain why he was able to be contacted to attend court despite no subpoena was issued to him. At the end of PW12's evidence the learned prosecuting officer applied for further adjournment on the ground that the prosecution was unable to produce 4 other witnesses to continue with the trial. The application by the prosecution was rejected because the prosecution had not done all that might reasonably be done to ensure that the trial proceeded as scheduled on 11 - 14.7.2005 and 23 - 25.11.2005 - the dates fixed for final adjournments of the continuation of trial. Accordingly, I made an order for the accused persons to be discharged not amounting to acquittal.

7. Immediately after [the learned Magistrate] pronounced [his] decision of discharge not amounting to an acquittal, both the learned defence counsels, namely, Mr. Voon Lee Shan and Mr. John Shek applied for the said order to be set aside. The defence's application was allowed and consequentially the prosecution was ordered to continue with the trial during the remaining 2 days as scheduled, i.e. 24 - 25.11.2005 by calling its witnesses and the investigating officer and thereafter to close its case.

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8. On 24.11.2005 the investigating officer was around the precincts of the court. Instead of calling the said investigating officer to give evidence as directed by the court the learned prosecuting officer requested for the trial to be adjourned on the ground that the investigating officer will be called as the last witness. The application for adjournment was refused and after which the Court made the following order:

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> (Delivering oral ruling). In view of the trial had dragged on for almost 5 years and that there had been repeated adjournments previously obtained by the prosecution it is my view that the refusal by the prosecution to call the investigating officer to give evidence and request for further adjournment does not appear reasonable at all. This is particularly so when the prosecution vouchsafed no reasons and authorities to support its stand that, in a criminal trial it is a legal requirement for the investigating officer to be called as the last witness.
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> Accordingly, it is my view that the prosecution is disentitled to any further indulgence and therefore I reject the prosecution's application for further adjournment. Now, as no further evidence forth coming or made available by the prosecution after court has granted final adjournment to the prosecution and after the court had given opportunity for the investigating officer to be called, which was not complied with, the prosecution's case has come to an end.
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> Parties are hereby directed to prepare their respective written submission on or before 18.1.2006 and reply on or before 3.2.2006. Adjourn to 27.2.2006 @ 9.00 a.m. for ruling at end of prosecution's case. Bail extended. Full Grounds of Decision as per Appendix 'B'.

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9. It is [the learned Magistrate's] considered opinion that further protraction of the trial will not be in the interest of justice. The trial had been postponed no less than 15 times since the accused persons were first charged in court on 11.9.2001. Of these 15 postponements, 7 were granted at the request of the prosecution. Three (3) adjournments were upon the application by the defence counsel for the 1st accused. Three (3) adjournments were granted at the behest of the defence counsel for the 2nd and 3rd accused. The remaining two (2) adjournments were made by court on the ground that the presiding magistrate was attending a Finance management course on 8 - 11.7.2002 and Judicial legal officers conference at Kuantan, Pahang on 14 - 17.12.2003.

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10. Now, the case has been rescheduled for ruling at the end of prosecution's case on 9.5.2006 @ 9.00 at Mahkamah Majistret, Betong.

## Issues

**[2]** In my view, basically there are two issues involved in this criminal revision:

(1) Whether the learned magistrate acted correctly in setting aside his order of DNAA after his pronouncement.

(2) Whether the learned magistrate acted correctly when upon his refusal to grant further adjournment ordered the parties to tender their respective submissions indicating that the prosecution's case come to an end and whether the learned magistrate may proceed to deliver his ruling as to whether the prosecution has made out a *prima facie* case against the three accused.

## Findings

*1st Issue*

**[3]** For the purposes of this revision, I will maintain the reference to the 1st, 2nd and 3rd respondents as 1st, 2nd and 3rd accused respectively and the applicant as the prosecution. Mr. John Shek submitted that the rulings of the learned magistrate did not affect the finality of the rights of both the accused and the prosecution and is not appealable relying on s. 307(1) of the CPC; *Maleb bin Su v. PP & Another Case* [1984] 1 CLJ 378; [1984] 2 CLJ (Rep) 232, *PP v. R.K. Menon & Anor* [1977] 1 LNS 101, *Indran & Anor v. PP* [1985] 1 MLJ 326, *Saad bin Abas & Anor v. PP* [1998] 4 CLJ 575. Mr. Voon Lee Shan submitted that the court is not *functus officio* at the time it made the pronouncement that the three accused were DNAA and therefore could still proceed to vary its own order that the discharge amounted to acquittal of the accused of the charges framed against them. Further, Mr. Voon submitted that it was merely a procedural matter as the issue of finality did not arise at all since the accused still could be recharged based on the same charges and same evidence.

**[4]** In his grounds of decision pertaining to the setting aside of his order of DNAA at p. 226 of the record of proceedings (ROP), the learned magistrate held the view that he could set aside his order of DNAA because it is a procedural ruling and there seems to be no legal restriction for a presiding magistrate to set aside or revise its procedural ruling provided there is justification in the application before the court to do so. Further, he added that this is a prevalent practice in the magistrate's court by illustrating with situations:

A (1) application by prosecution for reinstatement of criminal cases which had been DNAA;

(2) application by a party in a criminal proceeding for a further adjournment of a part-heard case after the trial dates had already been fixed and adjourned for a final time by the court; and

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(3) application by an accused for variation of the conditions of bond bail.

**[5]** As to what constitutes a procedural ruling, the prosecution referred the court to the case of *PP v. RK Menon (supra)* where Ajaib Singh J (as he then was) held that the ruling of the president of the sessions court in overruling the objection made by the counsel for the accused when the latter contended that a 'complaint' was not being made to a relevant court and thus the requirement under s. 129(i)(b) of the CPC was not complied with was only a procedural ruling and therefore not appealable. In arriving at this decision, the learned judge followed the Singapore case of *PP v. Hoo Chang Chwen* [1962] MLJ 284 where it was held that the prosecution or the defence cannot appeal in the middle of the trial against a procedural ruling because such a ruling is not an appealable order within the provisions of the CPC and the provisions of the CPC referred to in that case are in *pari materia* with our CPC relating to criminal appeals from the Subordinate Courts to the High Court.

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**[6]** In *Maleb bin Su*'s case *(supra)* and *Cheak Yok Thong*'s case *(supra)*, Hashim Yeop A Sani FJ (as he then was) in dealing with the question of the right of an appeal under s. 307(i) of the CPC stated that the word "order" in the said section must be "a final order in the sense that it is final in effect as in the case of a judgment or a sentence. The test for determining the finality of an order is to see whether the judgment or order finally disposes of the rights' of the parties... The order which finally disposes of the rights of the parties should be distinguished from a purely procedural ruling." In regard to what constitutes procedural ruling, His Lordship referred to *Hoo Cheng Chwen*'s case *(supra)* and *PP v. RK Menon & Anor*'s case *(supra)*.

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H **[7]** In my view, the three situations cited by the learned magistrate above cannot support his argument that an order of DNAA is purely a procedural ruling. I agree with the learned DPP that the 1st example is a procedure invoked after DNAA is ordered; example No. 2 is a procedure adopted in respect of an adjournment granted by the court and example No. 3 is an instance where there is a variation of conditions of bond when the circumstances warrant it. I am inclined to agree with the learned DPP that based on the cases of *RK Menon and & Anor (supra)*, *Hoo Cheng Chweng (supra)* and the case of *Maleb bin Su and*

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*Anor Appeal (supra)* an order of DNAA is not a procedural order but it is a substantive order made when the trial judge is of the view that the charge is groundless pursuant to s. 173(g) of the CPC; or where the court refused to grant any further postponement of a trial (see *PP v. Zainuddin bin Sulaiman & Ors* [1986] 1 CLJ 468; [1986] CLJ (Rep) 232 which I will discuss hereafter) or even under s. 254 of the CPC when the PP or the officer conducting the prosecution before the sessions court or magistrate's court as the case may be decline to prosecute further at any stage of any trial.

**[8]** Further, it is to be added that unlike the High Court, the Subordinate Court has no power to alter its judgment and the power for the former to do so is provided in s. 278 of the CPC which states "No Court, other than a High Court, having once recorded its judgment, shall alter or review the same. Provided that a clerical error may be rectified at any time, and that any other mistake may be rectified at any time before the court rises for the day." In this context, I believe that Mr. John Shek was mistaken when he submitted on 23 November 2005 before the learned magistrate that." "The order for [DNAA] can be set aside by the court provided that [he] has not come down from the bench after making the order [and he] still sits on the bench after making the order [DNAA] and has not retired to the chambers."

**[9]** For the aforesaid reasons, in my view, the learned magistrate erred in setting aside his order of DNAA. I now turn to the second issue.

## 2nd Issue

**[10]** As stated earlier, Mr. John Shek also approached this second issue on the ground that the ruling of the learned Magistrate did not affect the finality of the rights of the Accused and the Prosecution and is therefore not appealable. Mr. Voon Lee Shan held the view that the learned magistrate has acted correctly and relied heavily on *PP v. Mohamed Said* [1982] 1 LNS 115 and urged the court to distinguish *Zainuddin Sulaiman (supra)* a case which the learned DPP greatly depended on in support of the second issue.

**[11]** I agree with the learned DPP that *Zainuddin Sulaiman*'s case *(supra)* is applicable in the context of this present case and the principles spelt therein are binding on this court; and I am also mindful that the aforesaid case has criticised *Mohamad Said*'s case *(supra)*. To borrow the words of Salleh Abbas LP (as he then was) in *Zainuddin Sulaiman*'s case *(supra)* when His Lordship commented on *Mohamad Said*'s case *(supra)*, in my view, this instant case is a case where there is a situation of judicial prosecution confrontation - a dead lock which should

be avoided and solved. I agree with the learned DPP that the argument of Mr. Voon Lee Shan that *Zainuddin Sulaiman*'s case *(supra)* be distinguished on the ground that unlike *Zainuddin Sulaiman*'s case *(supra)* wherein the magistrate ordered an acquittal and discharge of the respondent without hearing any evidence of the prosecution and which was upheld by the learned High Court judge, cannot be sustained. The reason is that in this instant case, the matter has been part heard and as many as 12 witnesses have been called and the prosecuting officer has requested for further adjournment on the ground that the prosecution is unable to produce four more witnesses to continue with the trial. At this juncture, the dictum of Salleh Abas LP (as he then was) at p. 236 paras b - d, is instructive:

> Of course, postponements whether they be refused or granted are always at the discretion of the Court. Should it refuse a postponement, the dead lock which Mohamed Azmi J [in *Mohamad Said*'s case] had spoken about is not without solution. *It could be solved by continuous mutual respect and co-operation between the Court, the prosecution and the defence*. In ordering a discharge the Court should not be unduly concerned about the possibility of subsequent re-arrest and re-charging. There is every possibility (one always hopes for the best) that the prosecution may wish to discontinue the proceeding as frequent re-arresting and recharging would reflect badly on the conduct of the prosecution. In that event it may withdraw the charge or simply offer no evidence, or even enter a nolle prosequi. *If, however, the prosecution is not prepared to discontinue the proceeding*, as it might have a reason of public interest to continue and maintain it, *there are only two options open to the Court - grant the postponement sought for or discharge the accused. If the Court considers that a mere discharge does not meet with the justice of the case* because the offence by reason of numerous postponements has become trivial and lost its potency and that the case should be disposed of quickly the *Court should have made an order leaving the prosecution with no choice except to discontinue. Perhaps, a short adjournment or a last adjournment should be granted so as to enable the prosecution to makeup its mind one way or the other*. It might well be that in the end the prosecution may decide to discontinue. *Thus, the co-operation and mutual respect between the bench and the bar in the administration of justice is so important that it should not be undermined.*
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> (Emphasis added)

**[12]** I wish to emphasise on the words which I have underscored above. According to the facts of this case, the court has been very magnanimous; it has granted final adjournment of the trial on 11 to 14 July 2005 and a further final adjournment on 23 to 25 November 2005. In my view, the prosecuting officer has been alerted as far back as 11 - 14 July 2005 that the court is fixing the case for continuation of trial for the final time. What the prosecuting officer should have done was to seek instruction as to what is the next course of action; if the

prosecution does not wish to discontinue the case, bearing in mind that the court has fixed 11 to 14 July 2005 as the final date for the continuation of trial so as to enable the prosecution to make up its mind one way or another. The prosecuting officer has not done so but instead during the next sitting on 23 July 2005 called only one witness and requested for further adjournment. I find what is lacking in this case, is the cooperation and mutual respect between the Bench and the Prosecution which is required for the proper administration of justice. Sadly speaking, the prosecuting officer has not heeded the direction of the court when the court fixed 11 to 14 July 2005 as the final date for the continuation of the trial when the prosecuting officer called only three witnesses and sought further adjournment on the ground he wished to restudy the case and to call only the relevant witnesses. I believe that such unnecessary postponement in this case could have been curtailed if there had been greater cooperation and mutual respect between the Bench and the Prosecution as envisaged by the Federal Court in *Zainuddin Sulaiman*'s case *(supra)*.

**[13]** For the reasons above, in the circumstances of the case and with great reluctance, I set aside the order of the learned magistrate and order that the hearing of the case be continued on by him as soon as possible and the prosecution is to ensure that at the next date fixed for the continuation of hearing, there should be no further adjournment (barring any other unforeseen circumstances).